

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 98 of 2006

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal

Case No. 833 of 2006 – G. C. Mutembei [C.M.]

JENIFFER CHEBET MASAAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Jennifer Chebet Masai was charged with two offences. She was charged with trafficking narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act (Act No. 4 of 1994). The particulars of the offence were that on the 28th of March 2006 at Nakuru Railways Police Station yard, the appellant was found trafficking four kilograms of cannabis sativa (bhang) with a street value of Kshs 16,000/= while on board motor vehicle registration number KAS 397R operated by Mololine plying the Nakuru-Nairobi route. The appellant was further charged with being in possession of game trophy contrary to Section 42(1)(b) of the Wildlife Conservation Act and Management (Cap 376 Laws of Kenya).

The particulars of the offence were that on the same day at the same place, the appellant was found in possession of one python snake skin measuring 15 feet without a certificate of Wildlife Conservation and Management or any other officers authorized by the law. When the appellant was arraigned before the trial magistrate, she pleaded guilty to both charges. She was convicted on her own plea of guilty and sentenced to serve five years and two years imprisonment respectively for the two counts. The said sentences were ordered to run concurrently. The cannabis sativa (bhang) was ordered destroyed and the game trophy forfeited to the State. The appellant was aggrieved by her conviction and sentence and has appealed to this court.

In her petition of appeal, the appellant raised four grounds of appeal challenging her conviction and sentence. She was aggrieved that the plea of guilty entered by the trial magistrate was not unequivocal. She was further aggrieved that the plea was taken in a language which could not be ascertained or understood. She further was aggrieved by the sentence meted on her which in her view was unsafe. At the hearing of the appeal, Mr. Ogolla learned counsel for the appellant urged this court to find that the plea of guilty recorded by the trial magistrate was not unequivocal and further that the language of the court was not stated.

Mr. Ogolla further submitted that the failure by the trial magistrate to follow the procedure laid down in the case of Baya –vs- Republic [1984]KLR 657 and Adan –vs- Republic [1973]EA 445 meant that the plea of guilty recorded by the trial magistrate was illegal and ought to be set aside. He further submitted that none of the items which the accused was allegedly found in possession of were produced in evidence when the plea was taken. He urged this court to allow the appeal and order that the appellant be retried. Miss Opati for the State conceded to the appeal. She conceded that the plea of guilty that was recorded by the trial magistrate was defective and therefore occasioned injustice to the appellant. She submitted that the defects evident in the taking of the said plea could not be cured under the provisions of Section 382 of the Criminal Procedure Code. She urged this court to set aside the said conviction and order the

appellant to be retried.

I have read the record of the trial magistrate from which this appeal arose. I have also considered the submission made before me by Mr. Ogolla on behalf of the appellant and by Miss Opati for the State. The issue for determination by this court is whether the plea of guilty that was recorded by the trial magistrate was unequivocal. The procedure for recording a plea of guilty is provided by Section 207 of the Criminal Procedure Code. The Court of Appeal in the case of Adan –vs- Republic [1973] EA 445 further set down the guidelines which should be followed by a trial court when recording a plea of guilty. The said guidelines are in summary that the charge and the particulars thereof must be read to the accused in a language that he understands. All the essential ingredients that constitute the charge must be explained to the accused and his response thereto recorded. An accused person must confirm that he understands the charge and pleads guilty to the same. The court must record the language in which the plea was taken.

In the present appeal, the language in which the plea was taken was not recorded. It is not therefore clear whether the appellant understood the charge when it was read to her. Further, after it was recorded that she had admitted to the charges by stating that the charges were true, the trial court recorded the following:

“Plea of not guilty entered for the accused.”

It is therefore clear that the trial magistrate did not enter a plea of guilty but rather entered a plea of not guilty. While it may be said that the trial court made a typographical error when it recorded the plea of “not guilty” instead of the “plea of guilty,” in the opinion of this court, such error is so fundamental that it goes to the root of the entire plea taking exercise. It is not a mistake which can be overlooked or glossed over. It is therefore clear that the plea of guilty that was recorded by the trial magistrate was equivocal. The appeal filed by the appellant against conviction is therefore allowed. Her conviction is quashed and the sentences imposed set aside.

The issue that remains for determination by this court is whether or not to order a retrial. The appellant was arrested on the 28th of March 2006 and arraigned before the trial magistrate on the 30th of March 2006. On the first charge of being found trafficking narcotic drugs, the trial court ordered that the said *cannabis sativa (bhang)* be destroyed. There was no indication by the State that the said order destroying the *cannabis sativa (bhang)* was stayed or not given effect to. The principles to be considered by this court when deciding whether or not to order a retrial are well settled. One of the principles is that a retrial will not be ordered if the possibility of the prosecution securing a conviction of the appellant is remote. In the instant appeal, the prosecution cannot sustain a conviction against the appellant in the circumstances where the exhibits have been destroyed. This court will therefore not order the appellant to be retried.

She is consequently discharged. She is ordered released from prison and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 30th day of November 2006.

L. KIMARU

JUDGE